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Supreme Court, U.S.

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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ROGER MICHAEL AMES,

Petitioner,

v.

R. E. AMES AND R. G. AMES,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF TEXAS**

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QUESTIONS PRESENTED

(1) Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144, (ERISA) preempts the state common law cause of action of conversion in an action brought in the Texas State Courts against a plan fiduciary.

(2) Whether the federal courts have exclusive jurisdiction of a cause of action brought against a plan fiduciary who is accused of misappropriation and conversion of employee benefits in connection with the termination of a plan governed by ERISA.

(3) Whether the actions of a plan fiduciary accused of breach of fiduciary duty (conversion) are to be reviewed under state common law causes of action of general application, or under the express statutory provisions of ERISA, where the plan fiduciary terminated the plan and then failed to pay vested benefits to the plan beneficiaries.

(4) Whether ERISA statutory preemption and jurisdiction provisions cease to have further application at the moment of termination of a plan governed by ERISA.

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED	(i)
LIST OF PARTIES AND RULE 29.1 LIST	(vii)
TABLE OF AUTHORITIES	(viii)
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS DISCUSSED .	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	
I. State Law and Federal Law	
are in conflict over the	
application of ERISA to	
the conduct of a plan fidu-	
ciary at the point of termi-	
nation and distribution of	
benefits of a plan governed	
by ERISA	9

II. This case of first impression will establish whether ERISA, with its broad preemption, continues to govern the actions and alleged malfea- sance of a plan fiduciary after the event of formal termination of a plan, but prior to distribution of benefits to vested plan participants	14
A. The Texas ruling under- mines the intent of Congress to establish uniform fiduciary stan- dards in ERISA	15

B. The Texas ruling will have the effect of creating additional and conflicting standards and remedies for breach of fiduciary duty by plan trustees	15
--	----

III. If this Texas Supreme Court Opinion is allowed to stand, it is likely that Courts in Texas and in other states will begin to apply their own state laws of general application to the conduct of plan fiduciaries after a plan governed by ERISA has been terminated. The effect

will be to have ERISA's
standards governing a fidu-
ciary up to the moment of
termination, but state law
governing the actions of
the very same fiduciary
from the moment of

termination forward	24
CONCLUSION	44
APPENDIX A	1a
APPENDIX B	1b
APPENDIX C	1c

LIST OF PARTIES AND RULE 29.1 LIST

The following listed parties have an interest in the outcome of this case:

PETITIONER: ROGER MICHAEL AMES
RESPONDENTS: R.E. AMES (Deceased)
 and R.G. AMES

An additional party to the suit below was Heights State Bank. Heights State Bank is not a party to this Petition for a Writ of Certiorari, but may be filing its own petition. Heights State Bank is now known as NBC Bank, Houston - N.A., but will hereafter be referred to as Heights State Bank.

TABLE OF AUTHORITIES

<u>Statutes</u>	<u>PAGE</u>
28 U.S.C. § 1257	3
28 U.S.C. § 2104	3, 9
29 U.S.C. § 1001	3, 9
29 U.S.C. §§ 1104-06	3, 7, 16, 25, 26, 34, 35, 41
29 U.S.C. § 1132	3, 7, 13, 16, 17, 18, 19, 22, 36, 40
29 U.S.C. § 1109(a)	36
29 U.S.C. § 1144	3, 14, 16, 27, 28, 30, 31

Cases

<u>Amalgamated Clothing and Textiles</u>	
<u>Worker Union, AFL-CIO v.</u>	
<u>Murdock, 861 F.2d 1406 (9th</u>	
<u>Cir. 1988)</u>	36

	<u>PAGE</u>
<u>Ames v. Ames</u> , 776 S.W.2d 154 (Tex. 1989)	2, 31, 38
<u>Ames v. Ames</u> , 757 S.W.2d 469 (Tex. App. -- Beaumont, 1988), <u>aff'd as modified</u> , 776 S.W.2d 154 (Tex. 1989)	2
<u>Calamia v. Spivey</u> , 632 F.2d 1235 (5th Cir. 1980)	40
<u>District 65, UAW v. Harper & Row,</u> <u>Publishers, Inc.</u> , 576 F. Supp. 1468 (S.D.N.Y. 1983)	24
<u>District 65, UAW v. Harper & Row,</u> <u>Publishers, Inc.</u> , 696 F. Supp. 29 (S.D.N.Y. 1988)	39
<u>Duffy v. Brannen</u> , 529 A.2d 643 (Vt. 1987)	22, 23
<u>Dumac Forestry Services, Inc. v.</u> <u>International Brotherhood of</u> <u>Elec. Workers</u> , 637 F. Supp. 529 (N.D.N.Y. 1986)	22
<u>Justice v. Bankers Trust Co., Inc.</u> , 607 F. Supp. 527 (D.C. Ala. 1985)	22, 23

	<u>PAGE</u>
<u>Massachusetts Mutual Life Co. v.</u> <u>Russell, 105 S. Ct. 3085</u> <u>(1985)</u>	31, 41
<u>Mead v. Tilley, 109 S. Ct. 2156</u> <u>(1989)</u>	39
<u>Metropolitan Life Ins. Co. v.</u> <u>Taylor, 107 S. Ct. 1542</u> <u>(1987)</u>	24
<u>Pilot Life Ins. Co. v. Dedeaux,</u> <u>107 S. Ct. 1549 (1987)</u> . .	14, 24, 28, 30, 32, 39
<u>Ramirez v. Inter-Continental</u> <u>Hotels, F.2d</u> <u>1989 U.S. App. LEXIS 19190,</u> <u>No. 89-5509 (5th Cir.</u> <u>December 18, 1989)</u>	27
<u>Shaw v. Delta Air Lines, Inc.,</u> <u>103 S. Ct. 2890 (1983)</u> . .	14, 28, 39
<u>Trognor v. New York Life</u> <u>Ins. Co., 633 F. Supp.</u> <u>503 (D. Md. 1986)</u>	22
<u>Whitaker v. Texaco, Inc.,</u> <u>566 F. Supp. 745</u> <u>(N.D. Ga. 1983)</u>	24

Congressional Record

120 Cong. Rec. 29197 (1974) . .	29
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v.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME
COURT OF THE STATE OF TEXAS

The Petitioner, ROGER MICHAEL AMES,
respectfully prays that a Writ of Certio-
rari issue to review the Judgment and
Order of the Supreme Court of the State of
Texas rendered on the 12th day of July,
1989.

OPINIONS BELOW

The Opinion of the Texas Supreme Court is reported at 776 S.W.2d 154, (Tex. 1989), and a copy of the Opinion, together with the concurring and dissenting opinion, is attached hereto in Appendix A.

The Opinion of the Beaumont Court of Appeals is reported at 757 S.W.2d 469. A copy of the Opinion is attached hereto in Appendix B.

The Judgment of the 58th Judicial District Court of Jefferson County, Texas, is not reported. A copy is attached hereto as Appendix C.

JURISDICTION

The Judgment of the Texas Supreme Court was entered on 12th day of July, 1989. Petitioner filed a Motion for Rehearing, which was denied on the 4th day of October, 1989. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 and 28 U.S.C. § 2104.

STATUTORY PROVISIONS DISCUSSED

29 U.S.C. § 1001, 1104, 1106, 1132(a)(1)(B), 1132(e), and 1144. These sections are found in the Employee Retirement Income Security Act (ERISA).

STATEMENT OF THE CASE

In a case of first impression before the Texas Supreme Court, the question squarely presented was whether ERISA governs the conduct of a plan fiduciary after the Plan was terminated. Petitioner has timely insisted in all of the Courts below that his conduct should be reviewed in the federal court system under the statutory provisions of ERISA. Respondents, however, elected to pursue Petitioner under the state common law cause of action of conversion, in the state court system.

This suit for conversion and breach of fiduciary duty was brought by two beneficiaries (Respondents) of a pension and profit sharing plan governed by ERISA

(The Plan). The Respondents were the only two participants who sued. Petitioner was both a participant and the Trustee of the Plan. Petitioner and Respondents are brothers. The Plan was set up by the family business, Threaded Steel Products Company. The claim is that when the Plan was terminated, the two Respondents never received their share of the proceeds of the Plan.

If true, Petitioner breached his fiduciary duty to deliver the proceeds to Respondents. Instead of suing Petitioner in federal court for statutory violations of ERISA, Respondents elected to sue in state court under common law. The trial court entered a judgment against Petitioner. See Appendix C.

The intermediate Texas Court of Appeals affirmed, and appeal was taken to the Texas Supreme Court. See App. B. The Texas Supreme Court, over a vigorous dissent, affirmed. See App. A.

Petitioner urges that the Texas Courts do not have subject-matter jurisdiction of this case, because exclusive jurisdiction resides in the Federal Courts. Petitioner also urges that the state law cause of action upon which this case was tried, has been preempted by federal law. Finally, Petitioner urges that ERISA governs all of the conduct of the Plan Fiduciary, whether such conduct occurs prior to, or as a part of, termination of the Plan.

If state common law causes of action such as conversion have been preempted by

ERISA, then one must look to ERISA to determine which statutory provisions govern the conduct of the plan fiduciary which is at issue in this case. Under the sections dealing with breach of fiduciary duty, the standards of review and remedies available are clearly set forth. See 29 U.S.C. §§ 1104-06. Because this case involves a breach of fiduciary duty, exclusive jurisdiction resides in the federal court system. 29 U.S.C. § 1132(e).

In spite of the many decisions issued by this Court, in spite of the language of the federal statutes, and in spite of the legislative intent expressed by Congress, the Texas Supreme Court affirmed the rulings of the lower courts and allowed the judgment for conversion to stand

against your Petitioner on the first impression question of whether ERISA applies to the post-termination conduct of a plan fiduciary. The Texas Supreme Court held that, since the conversion took place after plan termination, ERISA no longer governed the conduct of the plan fiduciary. Your Petitioner urges that his conduct should be reviewed under the federal statutory scheme in the federal court system. Petitioner requests that this Petition for a Writ of Certiorari be granted.

REASONS FOR GRANTING THE PETITION

- I. State Law and Federal Law are in conflict over the application of ERISA to the conduct of a plan fiduciary at the point of termination and distribution of benefits of a plan governed by ERISA.

Threaded Steel Products Co. was a family owned business which had a pension and profit sharing plan (the Plan). There is no dispute that the Plan was covered by ERISA, 29 U.S.C. § 1001, et seq.

In the late 70's and early 80's, the company suffered financial losses, and was in danger of going out of business. The decision was made to terminate the pension

and profit sharing Plan. The Plan had been administered by Southwestern Life Insurance Company. At the time this decision was implemented, Mike Ames, your Petitioner, had become the sole Trustee, the plan fiduciary. Petitioner received the Plan funds from Southwestern Life Insurance Company, and paid out all of the proceeds due to all of the Plan beneficiaries who were ordinary employees and not family members. Only the family members did not receive their benefits. The family members were four brothers. Rodney Ames, the fourth brother, did not sue Petitioner.

There is no dispute in the record below that the Respondents were Plan beneficiaries, and were also entitled to receive their share of the proceeds of the

Plan upon its termination. This is not an action where the Plan administrator denied benefits to a Plan beneficiary. Instead, this is an action by Plan beneficiaries against the Trustee for conversion of the Plan funds and therefore, breach of fiduciary duty.

After the non-family beneficiaries were paid, Petitioner is accused of having pledged the four brothers' Plan proceeds to Heights State Bank. Whether the funds pledged at Heights State Bank included Respondents' funds is in dispute. See App. A and B. These funds were used to secure a series of loans made by the Bank to Threaded Steel Products Co. The funds were placed into one or more certificates of deposit. But Threaded Steel Products Co. ultimately failed to repay the loans,

and Heights State Bank offset the CD. Although the jury below found that Respondents failed to trace their funds into the CD which had been offset, the court of appeals reversed that portion of the trial court's judgment on the jury verdict. The Texas Supreme Court affirmed.

Petitioner has timely and consistently urged in the trial court and on appeal, that the state courts do not have subject matter jurisdiction over this cause of action, and that federal law has preempted the state common law causes of action under which this case was tried.

Petitioner has also urged at all levels of this litigation that the state law upon which this case was tried has

been preempted by ERISA. The Texas appellate courts disagreed.

This was not a suit for recovery of benefits against the Plan, such as was contemplated by 29 U.S.C. § 1132(a)(1)(B). Neither the corporation which set up the Plan nor the Plan administrator were made parties. Respondents even admitted in their brief before the Texas Court of Appeals that if this was a case of breach of fiduciary duty, then exclusive jurisdiction would reside in the federal courts. (Respondents' Brief in the Court of Appeals at pp. 15-16). That the facts may support one or more state law causes of action is not the appropriate test. The proper test is whether the state statute or common law asserted relates to the administration of an ERISA plan.

Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549 (1987); Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890 (1983); 29 U.S.C. § 1144(a).

Respondents did not plead any ERISA causes of action. The case was not tried under any ERISA causes of action permitted in state court. The instructions and special issues given to the jury dealt only with the preempted state law cause of action of conversion.

II. This case of first impression will establish whether ERISA, with its broad preemption, continues to govern the actions and alleged malfeasance of a plan fiduciary after the event of formal termination of a plan, but prior to distribution of

benefits to vested plan participants.

- A. The Texas ruling undermines the intent of Congress to establish uniform fiduciary standards in ERISA.
- B. The Texas ruling will have the effect of creating additional and conflicting standards and remedies for breach of fiduciary duty by plan trustees.

The Ames brothers were not denied their benefits under the terms of the plan. Their benefits were allegedly converted by the plan trustee for the use and benefit of the corporation. This is an important distinction. It is essential

that this Court find and hold the following:

(1) Preemption. The state common law cause of action asserted by R. E. Ames and R. G. Ames against Mike Ames has been preempted by ERISA. 29 U.S.C.A. § 1144. The alleged misdeeds on the part of Mike Ames are breaches of fiduciary duty expressly governed by the terms of ERISA under 29 U.S.C.A. §§ 1104-06.

(2) Jurisdiction. The case as pleaded and submitted to the jury below was not a case of denial of plan benefits. Neither the former employer,

nor the plan administrator, were sued. Only the trustee who allegedly converted the funds, and the Bank which received the funds, were sued. There is no issue in this case involving interpretation of the plan contract.

This case is not a suit to recover benefits under 29 U.S.C. § 1132(a)(1)(B). Consequently, the state courts of Texas do not have concurrent jurisdiction in this case. The case must be dismissed accordingly, for lack of subject matter

jurisdiction. 29 U.S.C.A.
§ 1132(e).

The ERISA Statutes in question
provide:

29 U.S.C. § 1132(a)(1)(B) provides:

"(a) Persons empowered
to bring a civil
action

A civil action may be brought --

(1) by a participant or beneficiary --

(B) to recover benefits due
to him under the terms
of his plan, to enforce
his rights under the
terms of the plan, or
to clarify his rights
to future benefits
under the terms of the
plan;"

§ 1132(e)(1) provides:

"(e) Jurisdiction

(1) Except for actions under
subsection (a)(1)(B) of

this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

The Texas Supreme Court Opinion. The Beaumont Court of Appeals decided that this was a case under 29 U.S.C. § 1132(a)(1)(B), holding that this was a suit to recover benefits. The Texas Supreme Court, however, focused on the timing of the events in this case, and found that since the conversion of the funds (deposit of the funds into Heights State Bank) occurred after Plan termina-

tion, such conduct on the part of the Plan fiduciary was not covered by ERISA at all.

In the concurring and dissenting opinion, two justices would have held that the case against Michael Ames was preempted, and that exclusive jurisdiction resided in the federal courts for such a case. This is correct. However, the majority opinion states that conversion occurred after termination of the Plan. In reality, that finding is an incorrect artifice to reach a desired result, which works to subvert the intent of the United States Congress. Termination of a Plan necessarily involves both the act of termination, and the distribution of the Plan benefits to the beneficiaries. Each event is controlled by the Plan fiduciary. The funds in question never left the

control of the Plan fiduciary, until the CD at Heights State Bank was offset. The beneficiaries who sued the Plan fiduciary never received control or possession of their funds. The investing in the CD, the placing of the Plan assets at risk, and the pledging of the funds was without their consent.

The majority opinion below would in effect establish a secondary regulatory scheme whereby federal law governs the actions of the trustee up to the point of termination of the Plan, but all acts of breach of fiduciary duty after termination would be controlled under state law. That clearly was not what Congress intended when it enacted ERISA. ERISA contains no limiting language which states that it ceases to apply to post-termination

breaches of fiduciary duty by the Plan fiduciary. Dumac Forestry Services, Inc. v. International Brotherhood of Elec. Workers, 637 F. Supp. 529 (N.D.N.Y. 1986); Trognor v. New York Life Ins. Co., 633 F. Supp. 503 (D.Md. 1986). Justice v. Bankers Trust Co., Inc., 607 F. Supp. 527 (D.C. Ala. 1985); and Duffy v. Brannen, 529 A.2d 643 (Vt. 1987).

In Duffy v. Brannen, 529 A.2d 643 (Vt. 1987), the Supreme Court of Vermont examines several different causes of action alleged against the plan trustee and administrator, and explains in a carefully reasoned opinion, supported by numerous citations, which causes of action fall under § 1132(a)(1)(B), and which do not.

Essentially, the Court drew a distinction between (1) an action against a plan to construe the contractual language of a plan to determine whether a participant is entitled to benefits, and (2) a suit by that same participant against the plan and its trustee for misconduct. The Court found that Congress intended this distinction. The state courts are well experienced in construing contracts, and in determining whether an individual is entitled to benefits under the contractual language of a plan. However, where the conduct of the plan fiduciary is at issue, the courts have found that it was the congressional intent that the federal courts determine the standards for misconduct. Duffy v. Brannen, supra, at pp. 648-51; Justice v.

Banker's Trust Co., supra; District 65, UAW v. Harper & Row, Publishers, Inc., 576 F. Supp. 1468 (S.D.N.Y. 1983); Whitaker v. Texaco, Inc., 566 F. Supp. 745 (N.D. Ga. 1983); Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549 (1987); Metropolitan Life Ins. Co. v. Taylor, 107 S. Ct. 1542 (1987).

III. If this Texas Supreme Court Opinion is allowed to stand, it is likely that Courts in Texas and in other states will begin to apply their own state laws of general application to the conduct of plan fiduciaries after a plan governed by ERISA has been terminated. The effect will be to have ERISA's standards governing a fiduciary up to the moment of termination, but state law governing

the actions of the very same fiduciary from the moment of termination forward.

In 29 U.S.C. § 1104-06, Congress has set forth certain fiduciary duties which govern the conduct of trustees. Mike Ames is accused of having converted the benefits of R. E. and R. G. Ames for the use of the corporation (Threaded Steel Products Co.) which instituted the plan. By allegedly having taken the benefits due the Ames brothers and having pledged them to secure loans for the family business, Mike Ames allegedly violated the express provisions of § 1104(a)(1): "(A) fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . ."

(A) For the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries."

In § 1106, Prohibited transactions,
it is written:

"(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--"

(B) lending of money or other extension of credit between the plan and a party in interest;

(D) transfer to or use by or for the benefit of a party in interest of any asset of the plan.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not -

(2) in his individual or any other capacity act in any transaction involving the

plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries."

By allegedly subjecting the Plan assets belonging to R. E. and R. G. Ames to the contractual rights of Heights State Bank to seizure and offset in the event of a default by Threaded Steel Products, at a time when Threaded Steel Products was in financial difficulty, Mike Ames, as Trustee, allegedly violated the express terms of ERISA. Where ERISA applies, state law is preempted. 29 U.S.C. § 1144. The fact that there may also be state common law causes of action which would govern such a claim does not avoid the preemption issue. Ramirez v. Inter-Continental Hotels, _____ F.2d _____, 1989

U.S. App. LEXIS 19190, No. 89-5509 (5th Cir. December 18, 1989).

This Court has consistently pointed out the expansive nature of the preemption statutes contained in ERISA. See Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890 (1983); 29 U.S.C. § 1144(a). In one of this Court's most recent expressions of the breadth of preemption, it was said in Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549 (1987), at p. 1551:

"In 1980, Dedeaux instituted a diversity action against Pilot Life in the United States District Court for the Southern District of Mississippi. Dedeaux's complaint contained three counts: 'Tortious Breach of Contract'; 'Breach of Fiduciary Duties'; and 'Fraud in the Inducement.' . . . Dedeaux did not assert any of the several causes of action available to him under ERISA . . ."

This Court carefully considered the legislation and the intent of Congress. It was considered whether to limit preemption, but that was rejected in the final bill as enacted. At page 1552, the Court quoted from 120 Cong. Rec. 29197 (1974), wherein Senator Williams said:

"It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal Regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law. Id. at 29933."

At issue were state causes of action pertaining to tortious breach of contract and bad faith dealings. This Court found

that Dedeaux's state common law causes of action were preempted by ERISA.

As in Dedeaux, supra, the cause of action asserted by the Ames brothers, Respondents, against their brother, Petitioner, under state law has surely been preempted. There is no issue in this case pertaining to a denial of benefits. There is no evidence of any denial of benefits. The only evidence pertains to the misappropriation and tracing of the missing funds. Because the trustee's conduct as a fiduciary administrator or trustee of an ERISA governed plan is at issue, that conduct and the standards by which it shall be judged, have been preempted by ERISA. 29 U.S.C. § 1144(a).

If the states are to stay in step with the recent holdings of the United

States Supreme Court, the majority line of cases in the lower federal courts, and the well reasoned opinions of the highest courts of some states, such as Vermont, then the decision below must be reversed.

If left undisturbed, the Opinion rendered by the majority in the Ames case below will have the effect of undermining the carefully crafted regulatory scheme set up by Congress. Congress sought to establish a single federal regulatory scheme for evaluating fiduciary conduct. Congress gave us "six carefully integrated civil enforcement provisions," Massachusetts Mutual Life Co. v. Russell, 105 S. Ct. 3085, 3093 (1985). Congress then gave the broadest preemption to this series of statutes in 29 U.S.C. § 1144

(1982). Pilot Life Ins. Co. v. Dedeaux,
107 S. Ct. 1549 (1987).

The Texas Supreme Court sought to evade this preemption by focusing on the single fact of the deposit of the ERISA funds into a CD at Heights State Bank, after termination of the Plan. The Court is focusing on this single event, but at the same time, is ignoring all of the other events which led up to this portion of the overall transaction. The insurance company administering the Plan, as a part of the termination of the Plan, delivered funds in excess of \$400,000.00 into the hands of the Trustee, your Petitioner. As a part of that termination of the Plan, Mike Ames paid in full the benefits to all non-family employees entitled to receive such proceeds upon termination. Up to

this moment in time, there had been no violations of either state or federal regulatory schemes and laws. The family company, Threaded Steel Products Co., was in desperate need of capital. The facts below show that Mike Ames then opened a CD at Heights State Bank which in one transaction was pledged to secure a new loan of capital to Threaded Steel Products Co. A series of transfers between Heights State Bank and another bank took place, with Mr. Ames being the person moving the money around. Finally, a \$254,000.00 CD was left in place at Heights State Bank, which ultimately was offset by that bank when Threaded Steel Products Co. failed to repay the working capital loan.

R. E. and R. G. Ames, respectively, never consented to these transactions, and

repeatedly requested to be paid their benefits. In answers to additional Special Issues, the jurors found that in then current dollars, R. E. and R. G. Ames were entitled to receive \$212,161.40 and \$94,501.00, respectively, and jointly to receive \$10,000.00 in punitive damages. Judgment was entered accordingly.

Section 404 of ERISA requires fiduciaries to discharge their duties with respect to a plan "solely in the interests of the participants and beneficiaries", and for the exclusive purpose of providing them benefits. 29 U.S.C. § 1104. In that section, a prudent person's standard is established. Section 406 of the act prohibits self-dealing and sales or exchanges between the plans and parties in interest. 29 U.S.C. § 1106. Section 405

sets out detailed rules governing the liability for breaches by a co-fiduciary. 29 U.S.C. § 1105.

Pledging a participant's funds for the benefit of the company would fall within these statutory prohibitions. This is certainly true if the activities took place prior to plan termination. This should certainly be true as well, if these activities took place as a part of plan termination. It should not make any difference whether these activities took place immediately prior to, during, or as a part of (but following) the technical event of plan termination.

This is a case of first impression for this Court. It is essential that this issue now be addressed. If the Texas Supreme Court opinion is allowed to stand,

it will be cited often by those who wish to avail themselves of conflicting state liabilities and remedies in dealing with the trustees who continue to handle the funds during and after termination.

The Ninth Circuit has recently held that ERISA does govern post-termination conduct of a plan fiduciary, in a case where the participants and beneficiaries receive their full actuarial benefits, but the plan fiduciary denied them any rights in the plan surpluses. Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406 (9th Cir. 1988). The Ninth Circuit allowed the plaintiffs to recover under 29 U.S.C. § 1109(a) and 1132(a)(3). Id. at 1417. The recovery pertained to "alleged ill-gotten profits", and the Court allowed a constructive trust

to be enforced against the profits in the hands of the plan fiduciary under ERISA.

The Court noted at page 1418:

"The key factor supporting plaintiffs' standing to sue in this case relates to the fiduciary's alleged scheme to profit personally from the breach of the duty of loyalty. In this case, the alleged scheme to profit from the breach included payment of plan benefits and termination of the plan. It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing to seek a constructive trust on those profits to redress the fiduciary's alleged breach of the duty of loyalty.

"A fiduciary has no legal right to retain profits obtained through breach of the duty of loyalty to an ERISA plan. It is appropriate for plan participants and beneficiaries to receive the fiduciary's ill-gotten profits because it was their plan benefits that were put at risk when the fiduciary allegedly breach the duty of

loyalty and used plan assets to further non-plan interests."

In the Murdock, supra, case, the Ninth Circuit applied ERISA to post-termination activities of the plan trustee. The Court found that there does exist a cause of action under ERISA for breach of fiduciary duty for such post-termination activities. In the Murdock case, the plan beneficiaries had received their benefits, as computed actuarially. The fight was over the surplus. In the Ames case, on the other hand, the Respondents never received even their actuarial benefits. The balance of the Plan assets, including all of their benefits, were pledged to secure the loan of Threaded Steel Products Co. That is a clear breach of fiduciary duty, and the

mere event of prior termination of the Plan should not be a controlling factor in deciding whether ERISA is applicable.

The District Court for the Southern District of New York also has concluded that ERISA fiduciary provisions govern the Plan fiduciary's activities in connection with a plan's termination. District 65, UAW v. Harper & Row, Publishers, Inc., 696 F. Supp. 29 (S.D.N.Y. 1988).

This Court has repeatedly held that ERISA preemption is pervasive. Mead v. Tilley, 109 S. Ct. 2156 (1989); Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549 (1987); Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890 (1983). Congress gave the federal courts exclusive jurisdiction over suits alleging a breach of the federal standards governing the conduct of the

plan fiduciary. 29 U.S.C. § 1132(e)(1). Congress even created provisions which require that the Secretary of Labor be served with a copy of such complaint so that the Secretary is granted the right to intervene in such suits. 29 U.S.C. § 1132(h). These provisions make it abundantly clear that Congress desired to ensure federal control over fiduciary principals. The opinion below conflicts with, and undermines, this federal statutory scheme. It must be reversed.

There are important differences in the federal scheme, when compared to the case as tried. This case was tried before a jury. No jury would have been available, had this case been tried in federal court under ERISA standards. Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980).

Punitive damages were awarded below. ERISA, unlike the state law, does not permit a participant to recover punitive or consequential damages under these circumstances. See Massachusetts Mutual Life Ins. Co. v. Russell, 105 S. Ct. 3085 (1985). The standard of conduct below was different. ERISA sets out statutory guidelines by which the conduct is to be measured. 29 U.S.C. § 1104-06. The case was tried below on a state common law cause of action conversion. The ERISA standards were not submitted to the jury for their consideration. Petitioner was denied the reasonable and prudent man standard set out in ERISA.

These differences between the state court proceeding below and the statutory scheme provided by Congress emphasize the

need for preservation of a uniform standard, which is to be developed in the federal courts under the federal statutory scheme. If the Texas Supreme Court's opinion is left undisturbed, the foundation upon which the federal common law has been developing will surely have a significant crack in it. If left uncorrected, that crack will propagate and lead to an ever increasing number of exceptions to the applicability of ERISA. That is to be prevented. ERISA must not be limited to pre-termination activities of the fiduciary. ERISA must govern the fiduciary all the way through the point of distribution of the last cent of plan assets. The fiduciary must have his actions reviewed by federal standards, without regard to the events in question

being pre- or post-termination. ERISA preemption is absolute where a breach of fiduciary duty is alleged, and exclusive jurisdiction resides in the Federal Courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that three true and correct copies of the above and foregoing PETITION FOR A WRIT OF CERTIORARI has been delivered by Certified Mail, Return Receipt Requested on this the 12th day of February, 1990, to the following:

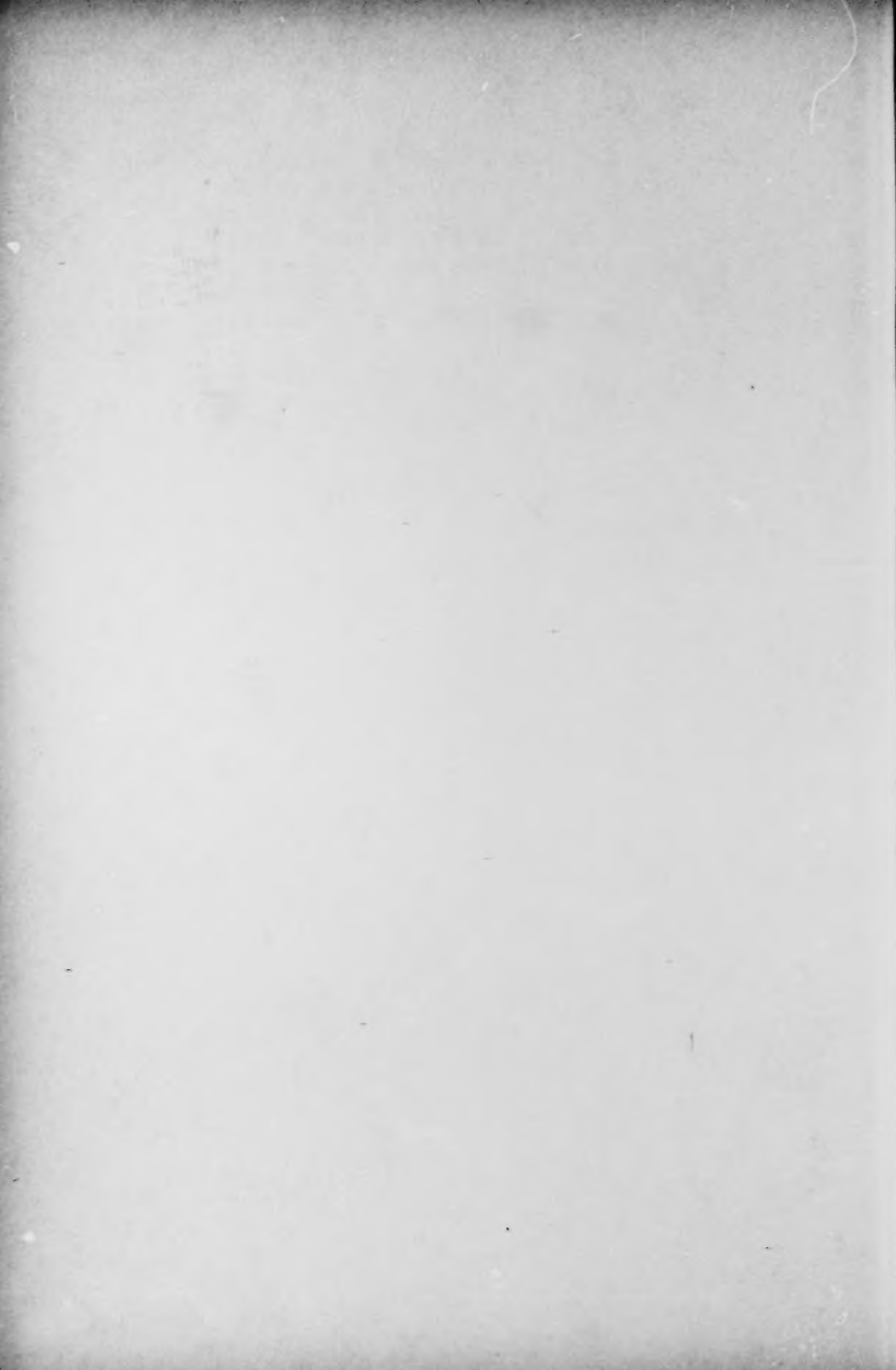
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DAVID D. PEDEN, JR.



APPENDIX A

ROGER MICHAEL AMES and HEIGHTS

STATE BANK, Petitioners

v.

R.E. AMES and R.G. AMES,

Respondents.

NO. C-8024

Supreme Court of Texas.

July 12, 1989.

Rehearing Denied October 4, 1989.

776 S.W.2d 154

[155] David L. [sic] Peden, James P. Wallace, W. Charles Campbell, Kenneth G. Norman, Austin, J. Hoke Peacock II, Beaumont, for petitioners.

Arthur R. Almquist, Kurt M. Andreason, Beaumont, for respondents.

MAUZY, Justice.

This case involves a suit for conversion of profit-sharing funds brought by beneficiaries of an employee benefits plan against the trustee and a third-party bank. After the plan was terminated, R.E. and R.G. Ames, employee members of a profit-sharing plan at Threaded Steel Products Company (Threaded Steel), sued the sole trustee of the plan, Roger Michael Ames (Mike) and Heights State Bank, now known as NBC Bank, Houston-N.A., claiming the two wrongfully converted their benefits from the plan. After a jury trial, the trial court rendered a judgment against Mike, awarding actual and

punitive damages.¹ A take-nothing judgment was rendered against Heights State Bank. The court of appeals affirmed and reformed the trial court judgment in part and awarded R.E. and R.G. an additional five percent penalty [156] because it concluded that the appeal was brought for delay and without sufficient cause. 757 S.W.2d 468. Further, the court of appeals reversed and remanded the cause of action against Heights State Bank. We

¹The trial court ordered that R.E. Ames recover \$242,161.40 and R.G. Ames recover \$94,501.00 in actual damages. Further, it was ordered that both R.E. and R.G. jointly recover \$10,000.00 in punitive damages.

modify the court of appeals' judgment to eliminate the five percent penalty and in all other respects affirm the judgment.

THE FACTS

Threaded Steel was a family owned corporation whose officers and shareholders included three brothers, R.E., R.G., and Mike Ames. Mike was the chairman and chief executive officer at all times pertinent to this controversy. He was also the sole trustee of the company's pension and profit-sharing plan which commenced in the early 1970's. The plan had been organized pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1985). The administrator of the plan was

Southwestern Life Insurance Company (Southwestern Life), who is not a party to this lawsuit.

In September 1982, Mike Ames, on behalf of Threaded Steel, applied for a loan in the amount of \$180,000 from Heights State Bank. The loan was declined because of the questionable financial condition of Threaded Steel. The company had suffered financial losses from 1977 through 1981.

In November 1982, steps were taken to terminate the profit-sharing plan because Threaded Steel was unable financially to contribute to the plan. Mike, as trustee, received a check in the amount of \$424,888.35 from Southwestern Life which represented all of the profit-sharing trust fund. Mike deposited these funds at

Heights State Bank in the following manner:

- (1) \$254,646.72 in a checking account styled R.E., R.G., R.L. and R.M. Ames, with Mike as the trustee and signor.
- (2) \$156,500 in a certificate of deposit (CD) in the name of the profit-sharing plan.
- (3) \$13,741.63 in a checking account in the name of the profit-sharing plan.

Without his brothers' knowledge or consent, Mike drew a check in the amount of \$254,000 against the Ames brothers' account ((1) above) payable to Interfirst Bank of Beaumont (Interfirst). The legend on the check stated "CD for R.E., R.G.,

R.M., R.L.² portion of TSP (Threaded Steel Products) Profit Share Plan." It is these funds which are the subject of this controversy. Upon termination of the plan, the remainder of the funds were disbursed to the other plan beneficiaries, all of whom were nonmembers of the Ames family.

After the transfer was made to Interfirst, \$157,895.02 was transferred back by wire to Heights State Bank.³ This

²R.L. Ames, also a brother, was not a party to the lawsuit against Mike and Heights State Bank.

³The record does not reflect what disposition was made of the excess of the funds originally transferred to Interfirst over the amount transferred back to Heights State Bank. Mike did not testify at trial, asserting his constitutional privilege against self-incrimination.

money, plus an additional sum borrowed from Heights State Bank, was used to purchase a CD in the amount of \$254,000. This CD was later pledged as collateral for commercial loans from Heights State Bank to Threaded Steel. Threaded Steel failed to repay the loans when they became due, consequently, the bank offset the CD against the amounts owing.

R.E. and R.G. brought suit in state district court against Mike and Heights State Bank alleging breach of fiduciary duty and conversion of their profit-sharing funds. The case was submitted to the jury under a state common law conversion theory. The jury found that Mike had converted the funds but failed to find that the CD in question contained any profit-sharing plan monies belonging to

R.E. or R.G. The trial court rendered a judgment for R.E. and R.G. against Mike and rendered a take-nothing judgment against the bank. The court of appeals affirmed the judgment as to R.E. and R.G. but reversed and remanded [157] the take-nothing judgment against the bank to the trial court. Both Mike and the bank filed applications for writ of error before this court.

APPLICABILITY OF ERISA

[1] Mike contends that under the provisions of ERISA the state court lacks subject matter jurisdiction. He asserts that even if the state court exercised concurrent jurisdiction, the action would be preempted by ERISA.

Subject matter jurisdiction over controversies involving profit-sharing plans under ERISA is provided for in 29 U.S.C. § 1132(e)(1) (1985), which reads:

Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Subsection (a)(1)(B) provides that a civil action may be brought by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future

benefits under the terms of the plan."
29 U.S.C. § 1132(a)(1)(B) (1985).

The facts present a novel issue: whether the provisions of ERISA continue to control after a plan is terminated and funds are distributed to some beneficiaries but the funds of two other beneficiaries are converted by the plan trustee? It is undisputed in the record that the Threaded Steel employees profit-sharing plan had been terminated prior to the deposit of R.E.'s and R.G.'s benefits into a CD at Heights State Bank. Mike distributed plan benefits to other employees, but he did not distribute R.E.'s or R.G.'s benefits to them. Instead, he placed their plan benefits in a separate account bearing his name as trustee.

The funds, which the jury found that Mike had wrongfully converted to his own use, were distributed from the plan after its termination. When he failed to distribute the benefits owed his brothers, he breached the fiduciary duty owed them under state common law and not under ERISA. The provisions of ERISA no longer governed his actions.⁴

The record shows that R.E. and R.G., as participants and beneficiaries of the

⁴Recently, in Mead Corp. v. Tilley, --- U.S. ---, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989), the United States Supreme Court applied ERISA to a case involving misconduct of a plan trustee which occurred during termination of a benefit plan. However, the instant case is distinguishable from Tilley because R.E. and R.G. sued for misconduct which occurred after termination of the plan was completed.

plan, sought to recover benefits owed them under the plan. Their cause of action arose out of the failure or refusal of the trustee of a terminated plan to convey benefits, not the violation of fiduciary duty created by ERISA in the continuing administration of a retirement plan. Given these circumstances, the state court properly exercised jurisdiction.

Preemption under ERISA is governed by 29 U.S.C. § 1144(a) (1985) which reads:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

The rationale for federal preemption of state remedies and causes of action

covered by ERISA is so that trustees of plans will not be subject to the threat of conflicting and inconsistent federal and state regulations. Hoffman v. Chandler, 431 So.2d 499 (Ala. 1983); Smith v. Crowder Jr. Co., 280 Pa.Super. 626, 421 A.2d 1107 (1980). Generally, ERISA preempts any state law which regulates the content or operation of the plan. Therefore, the question is whether R.E.'s and R.G.'s lawsuit "relates to" [158] the profit-sharing plan in such a way that it is an attempt to regulate areas explicitly governed by ERISA or whether it only indirectly relates to the plan so that it does not conflict with the purpose of ERISA. Shaw v. Westinghouse Elec. Corp., 276 Pa.Super. 220, 419 A.2d 175 (1980).

Lukus v. Westinghouse Elec. Corp., 276
Pa.Super. 232, 419 A.2d 431 (1980).

R.E. and R.G. sought to recover benefits due them under the plan after its termination. Their claims were directed at recovery of benefits under the terms of the plan and did not involve regulation of the plan. They instituted a lawsuit under Texas common law for recovery of their benefits which Mike had converted. Since the plan had terminated, we are not faced with interpreting the terms or conditions of the plan. Hence, the lawsuit did not "relate to" the employee benefit plan within the meaning of 29 U.S.C. § 1144(a) (1985).

Because we have concluded that ERISA does not apply and that if applicable the state court would have concurrent

jurisdiction, we hold that the state court properly exercised jurisdiction over the action.

THE BANK'S APPLICATION

Heights State Bank contends that the court of appeals erred in holding that the jury's negative finding on the bank's liability issue was against the great weight and preponderance of the evidence. Briefly, the facts which pertain to the bank are as follows. Mike deposited profit-sharing funds in the bank, some of which were placed into an account styled R.E., R.G., R.L., and R.M. Ames, with Mike indicated as trustee. A check in the amount of \$254,000 was then drawn against this account by Mike and transferred to

Interfirst. Then, \$157,895.02 was transferred from the Interfirst account back to Heights State Bank. This sum, plus additional money borrowed by Threaded Steel was used to purchase a CD in the amount of \$254,000. The CD was pledged as collateral to Heights State Bank for loans made to Threaded Steel. When the company failed to repay the loans, the bank offset the CD against the overdue notes.

R.E. and R.G. sued Mike as well as Heights State Bank for conversion of the profit-sharing funds. Based on the jury verdict, the trial court rendered a take-nothing judgment in favor of the bank. Specifically, the jury answered "no" to the following question:

Question No. 8

Do you find from a preponderance of the evidence that Heights State Bank Certificate No. 28793 contains profit sharing plan monies belonging to R.G. Ames and R.E. Ames?

The court of appeals held that the jury's negative finding of this issue inquiring about the offset CD was against the great weight and preponderance of the evidence. Further, the court of appeals held that the bank's officer knew or should have known that the funds on deposit in the CD were profit-sharing trust funds. The issue regarding the bank's knowledge was unanswered as it was predicated on an affirmative finding of Question No. 8.

Heights State Bank claims that the court of appeals failed to recognize the demarcation between the function of the

jury and appellate courts, and in so doing it usurped the function of the jury. The court of appeals had the task of determining whether the jury's negative answer to Question No. 8 was against the great weight and preponderance of the evidence. In its determination, the bank claims the court of appeals utilized an incorrect test.

[2-4] A court of appeals may reverse and remand a case for new trial if it concludes that the jury's "failure to find" is against the great weight and preponderance of the evidence. Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988). The Texas Constitution provides that the decisions of appellate courts "shall be conclusive of all questions of fact brought before them on

appeal or error." Tex.Const.art. V, § 6. This constitutional provision not only grants authority to the courts of appeals but limits the judicial authority of this court. Cropper, 754 S.W.2d at 648. Therefore, in our review of the court of appeals' holding that the jury's [159] answer is against the great weight and preponderance of the evidence, we do not have jurisdiction to weigh the evidence. We do, however, have jurisdiction to determine whether or not the court of appeals applied the correct standard in reaching its decision.

In Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986) the court set out a requirement which courts of appeals must follow in reversing on factual

insufficiency or great weight grounds.
The court stated that the courts of
appeals

should in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust. . . . Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.

Id. In this context, the court of appeals in the instant case went to great lengths in its attempt to follow Pool. It set out in detail and by actual quotes from the record the contrary evidence that it determined so greatly outweighed the evidence in support of the verdict. The court of appeals therefore performed its function in reviewing the evidence.

Heights State Bank has offered another rendition of the facts in an attempt to convince us that the court of appeals' factual determination was incorrect. As previously discussed, we have no jurisdiction to make such determination.

CONCLUSION

We modify the court of appeals' judgment to eliminate the five percent penalty and in all other respects affirm the judgment. The state court properly exercised jurisdiction over the cause of action and the court of appeals correctly applied the standard mandated by this court in Pool.

GONZALEZ, J., concurs and dissents,
COOK, J., joins.

GONZALEZ, Justice, concurring and
dissenting.

I agree with the court's disposition regarding the cause of action against Heights State Bank. However, I disagree that a trustee of a pension and profit-sharing plan organized pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1985), can wiggle out from under federal jurisdiction and/or from the application of federal law by merely terminating the plan before he or she absconds with the funds. To allow this to happen, as the court has done in this case, frustrates the intent of Congress to provide stability and uniformity in this area of the law. Thus,

I would reverse that portion of the court of appeals' judgment which affirms the trial court's judgment and dismiss the cause as to Roger Michael Ames (Mike).

This case involves a suit for conversion and breach of fiduciary duty brought by beneficiaries of a pension and profit-sharing plan against the trustee of the plan and a third-party bank. R.E. and R.G. Ames were employees of Threaded Steel Products Company (Threaded Steel) and were members of its profit-sharing plan. Their brother, Mike, also an employee and member of the plan, was the sole trustee of the plan. R.E. and R.G. sued Mike after the plan was dissolved, claiming that he did not perform his fiduciary duties and that he and Heights State Bank converted plan benefits.

JURISDICTION

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). As a remedial statute, ERISA provides for federal causes of action for recovery of benefits due under pension and welfare plans and for breach of fiduciary duty by plan beneficiaries. 29 U.S.C. §§ 1109, 1132(a)(1)(B) (1985). Jurisdiction over matters involving profit-sharing plans under ERISA is provided in 29 U.S.C. § 1132(e)(1) (1985) which reads:

Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States

shall have exclusive [160] jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Subsection (a)(1)(B) provides:

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(B) to recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

It was Congress' intent to establish an inclusive statutory scheme to regulate employee benefit plans and to provide stability and uniformity in this area. See 29 U.S.C. §§ 1001(a), (b) (1985). To ensure this goal, ERISA has a preemption

clause which provides that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." Id. § 1144(a).¹ For purposes of this provision, "state law" includes a state's decisional law. Light v. Blue Cross & Blue Shield of Alabama, Inc., 790 F.2d 1247, 1249 (5th Cir. 1986); 29 U.S.C. § 1144(c)(1) (1985). See also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). This provision, as interpreted by the United States Supreme Court, demonstrates Congress' intent "to establish pension

¹State laws which regulate banking, insurance, or securities are exempt from this preemption provision. 29 U.S.C. § 1144(b)(2)(A) (1985).

plan regulation as exclusively a federal concern." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523, 101 S.Ct. 1895, 1906, 68 L.Ed.2d 402 (1981).

In the instant case, Mike claims that pursuant to ERISA the cause of action asserted against him is not within the state court system's jurisdiction and should therefore be dismissed. Alternatively Mike contends that even if the action against him is for recovery of benefits, which would give state courts concurrent jurisdiction under 29 U.S.C. § 1132(a)(1)(B), the action is nonetheless preempted by ERISA and should therefore be dismissed since it was tried on state common law and statutory grounds.

In order for state courts to have subject matter jurisdiction to consider

the action against Mike, it must be determined to be an action by plan participants seeking to recover or clarify rights to benefits "under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (1985). While Mike contends the action against him is for breach of fiduciary duty, R.E. and R.G. claim their suit is for recovery of benefits under the pension and profit-sharing plan which had been terminated. Hence, R.E. and R.G. claim that not only do Texas courts have jurisdiction over their suit, but that it is not preempted by ERISA as the action is only incidently or tangentially related to a benefit plan which is no longer in existence.

The case was pleaded and submitted to the jury on the theory of conversion. The instructions and special issues dealt only

with conversion under state common law and the power a trustee has in transferring trust funds under state statutory law. Hence, the issue in this case at the trial court level was not whether R.E. and R.G. were contractually entitled to benefits under the terms of the plan. It is undisputed that the Ames brothers are due benefits under the terms of the plan. The claims asserted involve conversion of plan benefits and thus it is my view that R.E. and R.G. place at issue the propriety of certain conduct by Mike as trustee and call for construction and application of the standards of conduct established by ERISA. (Emphasis theirs.)

Section 1104 of ERISA provides for certain duties owed by fiduciaries to plan beneficiaries. By allegedly having taken

the benefits due the Ames brothers and having pledged them to secure loans for Threaded Steel, Mike allegedly violated express provisions of section 1104(a)(1) which provide that "a fiduciary shall discharge his duties [161] with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." Undoubtedly, conversion of plan benefits by a trustee constitutes a breach of fiduciary obligations under ERISA. Therefore, the action against Mike, however labeled, is in actuality a claim for breach of fiduciary duty and should not be considered as a claim for plan benefits conferring Texas

state courts with subject matter jurisdiction.

In reaching this conclusion, I would restrictively interpret the phrase, "under the terms of the plan" in 29 U.S.C. § 1132(a)(1)(B) to mean state court jurisdiction is limited to suits solely involving application or construction of the terms of the plan in determining whether a participant or beneficiary is entitled to benefits as a matter of contract law. (Emphasis theirs.) This interpretation is in keeping with holdings of a majority of courts which have addressed this issue. See, e.g., Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500 n.2 (9th Cir. 1984); Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Sec. Life Ins. Co.,

600 F.2d 671, 676 (7th Cir. 1979); Morrissey v. Curran, 567 F.2d 546, 549 (2d Cir. 1977); Lembo v. Texaco, Inc., 194 Cal.App.3d 531, 538, 239 Cal.Rptr. 596, 600 (1987); Young v. Sheet Metal Workers' Int'l Ass'n, 112 Misc.2d 692, 698-699, 447 N.Y.S.2d, 798, 803 (Sup.Ct. 1981); Goldberg v. Caplan, 277 Pa.Super. 47, 54, 419 A.2d 653, 657 (1980); Duffy v. Brannen, 148 Vt. 75, 529 A.2d 643, 651 (1987). But see Hoffman v. Chandler, 431 So.2d 499 (Ala. 1983).

PREEMPTION

Even if the claims asserted against Mike are within the state courts' jurisdiction, I believe that they would be preempted by the express provision of

ERISA which provides that the Act preempts all state laws as far as they relate to employee benefit plans. 29 U.S.C. § 1144(a). See generally Bishop & Denney, Hello ERISA, Good-bye Bad Faith: Federal Pre-emption of DTPA, Insurance Code and Common Law Bad Faith Claims, 41 Baylor L.Rev. 267 (1989). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw, 463 U.S. at 96-97, 103 S.Ct. at 2899-2900. Therefore, even if the suit against Mike were considered to be a contract action to recover plan benefits, it would fall directly under ERISA's preemptive provision. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987). Further, it has

consistently been held that because of the broad goals of Congress in enacting ERISA, the Act preempts state common law causes of action that do not expressly concern pension plans. See Alessi, 451 U.S. at 523-24, 101 S.Ct. at 1906-07. Hence, ERISA's preemptive effect over state law claims "depends on the conduct to which such law is applied, not on the form or label of the law." E-Systems, Inc. v. Taylor, 744 S.W.2d 956, 959 (Tex.App. -- Dallas 1988, writ denied) (citing Scott v. Gulf Oil Corp., 754 F.2d 1499, 1504 (9th Cir. 1985)). See also Gorman v. Life Ins. Co. of North America, 752 S.W.2d 710, 714 (Tex.App. -- Houston [1st Dist.] 1988, writ requested); Sams v. N.L. Indus., Inc. 735 S.W.2d 486, 489 (Tex.App. -- Houston [1st Dist.] 1987, no writ); Giles v. TI

Employees Pension Plan, 715 S.W.2d 58, 59
(Tex.App. -- Dallas 1986, writ ref'd
n.r.e.).

At trial, the jury affirmatively answered a special issue which asked if Mike converted the funds due R.E. and R.G. under the Threaded Steel profit-sharing plan. Thus, I believe that it is clear that although the common law cause of action of conversion does not regulate pension plans, the conduct relied on by the Ames brothers to establish their claim pertains to proper handling of plan funds. (Emphasis theirs.)

CONCLUSION

In my view, the court has erroneously placed emphasis on the fact that the plan

was terminated. R.E. and R.G. claimed in their pleadings and through testimony that Mike did not perform his duties as trustee and fiduciary of the plan. This claim specifically places Mike's conduct with respect to the plan itself at issue. Therefore, applicability [162] of ERISA is unavoidable. Moreover, as a practical matter, it is unwise to hold that Mike is no longer subject to ERISA's standards simply because the plan was terminated. If this were Congress' intent, it would behoove a plan fiduciary to avoid the application and consequences of ERISA violations by terminating the plan before committing fraud or other breaches of fiduciary duty. I believe the better view dictates that ERISA governs both pre- and post-termination conduct by plan

fiduciaries as it relates to profit-sharing funds. See Mead Corp. v. Tilley, --U.S.--, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989) (termination of the plan did not remove the action from the confines of ERISA).

For the above reasons, I dissent.

COOK, J., joins in this opinion.

APPENDIX B

Roger Michael AMES, et al.,

Appellant,

v.

R.E. AMES and R.G. AMES, et al.,

Appellees.

NO. 09-87-125 CV.

Court of Appeals of Texas,

Beaumont.

Aug. 25, 1988.

Rehearing Overruled September 14, 1988.

757 S.W.2d 468

[470] David D. Peden, Jr. and Read Koury, Richie & Greenberg, P.C., Houston, for appellant.

Arthur R. Almquist, Mehaffy, Weber, Keith & Gonsoulin, J. Hoke Peacock,

Orgain, Bell & Tucker, Beaumont, for appellees.

OPINION

BROOKSHIRE, Justice.

In the trial court R.E. Ames and R.G. Ames were plaintiffs and the Heights State Bank, now known as the NBC Bank, Houston - N.A., was a defendant. The litigation involved the claims of R.E. Ames and R.G. Ames, who were participants in the Threaded Steel Products Company employees profit sharing plan, hereafter "the plan". The litigation was also brought by the plaintiffs against Roger Michael "Mike" Ames, the trustee of the profit sharing plan, based on his failure to distribute

sums of money owing to the plaintiffs under the plan, and for his wrongful conversion of those sums of money to his own uses.

The proceeding was brought against the Heights State Bank to recover certain funds of the plan that had been deposited in the bank evidenced by a certain certificate of deposit placed with the bank. The funds in the certificate of deposit originated in the profit sharing plan which belonged to the plaintiffs but were wrongfully pledged by Mike Ames as trustee as collateral for commercial loans made to the Threaded Steel Products Company.

In a juried proceeding the district court signed and rendered a judgment against Mike Ames for conversions of the

sums due the plaintiffs in the sum of \$212,161.40 to R.E. Ames and a separate sum of \$94,501.00 to R.G. Ames. The judgment awarded an additional \$10,000.00 in punitive damages for tortious conversion committed by Mike Ames. However, the court below entered judgment that R.E. Ames and R.G. Ames take nothing against the Heights State Bank. The Appellants, plaintiffs below, have properly and timely perfected their appeal from the take nothing judgment entered on their claims against the Heights State Bank, hereinafter "State Bank".

The appeal involving State Bank is based on two points of error, the first being that the district court erred in denying the Appellants' Motion for Judgment Notwithstanding the Verdict as to

the State Bank because the evidence herein established as a matter of law that the funds in the certain certificate of deposit were the profit sharing trust funds that actually belonged to R.E. Ames and R.G. Ames.

The second point of error argues that the district court erred in denying the Appellants' Motion for New Trial because of the jury's negative answer to a question whereby the jury failed to find that the funds on deposit in certificate No. 28793 were profit sharing trust funds belonging to the two plaintiffs, this failing to so find being against the great weight and preponderance of the evidence.

The General Background

R.E. "Eddy" Ames and R.G. Ames were both employees of Threaded Steel Products Company. Eddy Ames started working for the company in 1948. He began as a laborer. Threaded Steel was a family owned company. Later, Eddy joined the Air Force for four years. Afterwards he returned to Threaded Steel and remained there until 1980, serving as an employee for thirty years. He rose to Chief Executive Officer and Chairman of the Board. R.E. "Eddy" Ames possessed an ownership interest in the company, owning approximately 20% of the stock. R.E. and R.G. Ames were, as employees, members of the profit sharing plan at Threaded Steel.

Steps were taken in 1983 to terminate and wind up the profit sharing plan. The first efforts made to set up such a profit sharing plan began around 1972. R.E. "Eddy" Ames did not withdraw his share of the plan because he was not sixty years [471] old at the time he left Threaded Steel. After the plan was terminated he was told that Mike Ames, the plan trustee, had put the funds belonging to R.E. Ames and R.G. Ames in a certificate of deposit at the Heights State Bank in Houston.

Mike Ames, the sole trustee, never distributed or delivered any profit sharing benefits under the plan to either R.E. Ames or R.G. Ames even though he was asked for these funds on several occasions.

It is important to note that Mike Ames as trustee opened an account with Heights Bank in November of 1982. Mike Ames told Mr. James E. Sheffield directly, who was senior vice-president of the State bank, which Sheffield admitted, that he, Mike Ames, was the sole trustee of the profit sharing plan (also referred to as the pension plan) for Threaded Steel Products Company's employees.

At that time a check from Southwestern Life Insurance Company in the amount of \$424,000 and some-odd dollars- was delivered and negotiated to the Heights State Bank. This was the check that Mike Ames used to open the initial account in Heights State Bank in November of 1982. After these funds were deposited with the Bank an amount of approximately

\$254,000.00 was deposited in a checking account styled R.E., R.G., and R.L. Ames, with Mike Ames as the sole signatory. This \$254,000.00 was part of the \$424,000.00 from Southwestern Life Insurance Company. Out of this sum \$156,500.00 was used to purchase a certificate of deposit in the name of Threaded Steel Products Company employees profit sharing - distribution account. An additional \$13,741.00 was deposited into a checking account in the name of Threaded Steel Products Company employees profit-sharing distribution account.

The \$13,741.00 was subsequently distributed to a group of employees entitled to the same. The \$156,500.00 was subsequently deposited into the same account as the \$13,741.00. The CD was in

effect for about thirty days. It was renewed one time for another sixty days or so. The \$156,500.00 was "rolled over" and put into a checking account. It was distributed to the employees.

Background narrative of events prior
to November, 1982

In the fall of 1982 prior to the above-described transaction, Mike Ames contacted James. E. Sheffield, who was then acting as a senior vice-president in the commercial loan department.

In September of 1982 a loan application was made by Mike Ames in behalf of Threaded Steel Products Company in the amount of \$180,000.00. The loan was declined and never thereafter approved.

The lack of approval was due to the poor financial condition of Threaded Steel Products. It should be borne in mind, as we interpret Defendant's Exhibit No. 1, that Threaded Steel Products, according to its Financial Analysis, had a loss in 1977. This loss before taxes was about \$87,000; in 1978, the loss was approximately \$259,000; in 1979, about \$70,000; in 1980, about \$441,000; and, 1981, about \$228,000. Apparently, Threaded Steel had a profit during the first six months of 1979 but not the last six months. These financial facts showing heavy losses clearly prove that any funds used by Threaded Steel Products as collateral for commercial loans necessarily came from the profit-sharing plan, inasmuch as Threaded Steel Products only five months before was

denied a loan due to its poor, distressed financial condition. The State Bank knew about these horrendous losses. They totalled \$1,085,000.00. These losses are up to date through 1981. Then, very shortly, in the late summer of '82, Threaded Steel Products made its application for a loan in the amount of \$180,000.00 with the State Bank.

\$254,646.02 of the profit-sharing funds were transferred to InterFirst Bank in Beaumont. Later, \$157,895.02 was transferred by wire back to the State Bank. A CD was bought in the name of R.M. "Mike" Ames, Trustee. The CD was in the total amount of \$254,000.00. This sum represented the \$157,895.02 plus an additional, approximate \$100,000.00, which was borrowed from the bank, less about

\$3,000 [472] deposited to a checking account. The CD in the amount of \$254,000.00 was wrongfully pledged as collateral for the commercial loans to Threaded Steel.

Later the Bank off-set this large CD to pay a commercial loan owed to the Bank. In his deposition Sheffield testified that he was aware that the funds from the large Southwestern Life Insurance Company check were initially deposited into the large CD which were then wired to InterFirst Bank in Beaumont and the funds were merely rewired back from InterFirst to State Bank through another Houston Bank.

Mike Ames, trustee, was served with certain Requests for Admissions. These Requests were challenged with the asserted privilege afforded to Mike Ames by the

Fifth Amendment to the Constitution of the United States. Mike Ames, by a Motion in Limine, clearly set forth that he declined to answer questions which answers may tend to incriminate the person answering the questions; namely, Mike Ames.

Upon reviewing and analyzing the record, we conclude the district court fell into error in denying the plaintiffs-appellants' Motion for Judgment Notwithstanding the Verdict as to State Bank. The reason for finding error is that the evidence, we conclude, establishes and proves that the funds in the certificate of deposit No. 28793 were actually profit-sharing funds that belonged to the plaintiffs and the State Bank knew it. The record establishes that the State Bank added to the funds that had

been "re-remitted" to it from the Inter-First Bank sufficient amounts to raise the total in the certificate of deposit to \$254,000.00, the original amount of the profit-sharing CD.

The amount of this CD was equal to the account that had been previously opened with funds directly from the Southwestern Life Insurance Company in the names of the plaintiffs, R.E. Ames and R.G. Ames. The State Bank converted this CD to pay off the loans and a letter of credit made by Threaded Steel.

[1] The State Bank's officer knew or should have known that the funds on deposit in the CD were the profit-sharing trust funds. The record shows that these funds were, in fact, the two plaintiffs' profit-sharing trust funds and R.E. and

R.G. Ames have established the identity and the tracing of these funds, we think, virtually as a matter of law. We decide that under the proper standards and criteria of review that the jury's verdict concerning these funds is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Potter v. Garner, 407 S.W.2d 537 (Tex.Civ.App.-Tyler, 1966, writ ref'd n.r.e.); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex.1986).

In summary, the evidence proves that the profit-sharing funds of the plaintiffs were taken by Mike Ames as trustee and placed on deposit at the State Bank. Then these same funds were transferred to InterFirst Bank in Beaumont and the funds

were forthwith returned from InterFirst Bank to State Bank. These same monies were then placed in a new certificate of deposit in the name of Mike Ames, Trustee, in the amount of \$254,000.00, the same amount that was previously transferred to InterFirst Bank.

Crucial Facts in the Record

In November Mike Ames opened a bank account in Heights Bank and did so by a check from Southwestern Life Insurance Company in the amount of \$424,888.35. The entire \$424,888.35 was profit-sharing trust money. State Bank had notice of this fact. At that time, Mike Ames told Sheffield that he, Ames, was the sole Trustee of the profit sharing plan, the

trust fund pension plans, for Threaded Steel Products. \$254,000.00 of the \$424,888.35 was directly deposited into a checking account styled R.E., R.G. and R.L. Ames with Mike Ames, Trustee, as the signer. Then \$156,500.00 of the \$424,888.35 was used to purchase the certificate of deposit in the name of Threaded Steel Products Company Employees' Profit-Sharing Distribution account and \$13,741.00 was deposited into a checking account under the name of Threaded Steel Products Company [473] Employees' Profit-Sharing Distribution Account. The \$13,741.00 was subsequently distributed to a group of employees who were in the profit sharing plan of which the Bank had notice. In January of '83 Mike Ames wired funds from the InterFirst Bank-Beaumont to

State Bank through the First City Bank, Houston, in the amount of \$157,895.02. At that time, Mike Ames purchased the CD in the amount of \$254,000.00 in his name as Trustee. The Bank had notice that it was issued in the name of Mike Ames as Trustee. The Bank and its senior lending officer Sheffield had notice that Mike Ames was sole Trustee for the plan. The CD was in the total amount of \$254,000.00 which in turn represented \$157,895.02 plus an additional \$100,000.00 which Mike Ames, trustee, obtained from the bank less about \$3,000 placed in a checking account. These facts were testified to by Mr. Sheffield. Then in the spring of '83, the Bank converted this CD to pay off the commercial loans. The banker admitted that the monies that were in the

certificate of deposit had been issued to the fiduciary trustee; but these monies were actually used to pay off commercial loans. A letter of credit in favor of Threaded Steel Products was also paid. Hence, the record clearly demonstrates the Bank utilized known profit-sharing trust funds belonging to employees to retire commercial loans to Threaded Steel. The banker further admitted that neither R.G. nor R.E. Ames had ever given any type of permission to use their trust fund pension benefits as collateral for commercial loans.

Mike Ames, Trustee, wrote a draft in the amount of \$254,646.02 on account number 80-17565 payable to the order of the InterFirst Bank of Beaumont. The reason for the said check, stated on its

face, was to purchase a certificate of deposit for R.E., R.G., R.M. and R.L. Ames' portion of the Threaded Steel Products profit-sharing plan. The State Bank had notice of this as clearly proved by Plaintiffs' Exhibit 10.

About two weeks later, on December 1, 1982, Mike Ames, together with an attorney as secretary and counsel for Threaded Steel, and R.L. Ames, vice-president of Threaded Steel, met as the Threaded Steel corporate board of directors. They adopted a corporate resolution giving Mike Ames individually [not as trustee] the authority from the corporation only - not from the beneficiaries of the plan - "to sign any and all checks, drafts, orders against any funds at any time standing in the credit of Threaded Steel and said

bank, Heights State Bank, and/or against my account with Heights that an account shall be established in the name of this corporation with Heights State Bank. That said Bank is hereby authorized to honor any and all checks so signed including those drawn to the individual order of such officer without further inquiry or regard to the authority of the said officer to use such checks or the proceeds thereof or remain singly as authorized to borrow on behalf of this corporation from said Bank and to execute...for the repayment of any sums so borrower,...and to pledge...as security...property...." These resolutions dealing with corporation funds as distinguished from Trustee funds were drawn on the forms submitted by the State Bank.

The resolutions consistently speak of any property or funds that belonged to the corporation. Mr. Sheffield testified that his bank required such a resolution and such a form be completed and signed before a corporation placed its money into an account with the Bank.

Even though the senior vice-president of State Bank testified that he had no dealings with Mike Ames between November 17, 1982 and January 20, 1983; nevertheless, there exists in the record a form provided by the Bank and the commercial lending department thereof, which was a corporate resolution. This resolution did not pertain to the Profit-Sharing Plan in any manner.

A Summary

In sum, the record is clear that Mike Ames first attempted to have dealings with the State Bank in September of 1982, contacting Mr. James E. Sheffield. Mr. Sheffield was a senior vice-president of Heights Bank in charge of commercial lending. A loan application was made and delivered in [473] September of '82 by Mike Ames in behalf of Threaded Steel Products Company for the sum of \$180,000.00. That loan request was refused. The reason for refusal was that Threaded Steel was in a poor, distressed financial condition. Threaded Steel accounting records reflected three consecutive years of heavy financial losses. Then on November 16, 1982, Mike

Ames opened an account with State Bank and it is particularly salient and crucial that the account was opened with a check from Southwestern Life Insurance Company that represented the then total assets of the Threaded Steel Products profit-sharing plan. The Bank knew this. This check was in the amount of \$424,888.35. At that time Mike Ames told Mr. Sheffield that Mike Ames was the sole trustee of the Threaded Steel profit-sharing plan which was also a type of pension plan for the Threaded Steel employees. Approximately \$175,000.00 was disbursed to other eligible individuals as participant of the profit sharing plan. The Bank knew of these facts.

In September of '82 when the first application for a loan was made, the

banker recalled that the company was apparently heavily engaged in litigation. The banker unequivocally acknowledged that Mike Ames told him when the Southwestern Life Insurance Company check was deposited in Heights State Bank that Mike Ames was acting as the sole trustee of the profit-sharing plan of Threaded Steel Products. The only significant history that the State Bank had with Mike Ames was as a trustee and that he was the sole trustee for the profit sharing plan. Under the totality of the circumstances of the record it appears irrefutable that the bank had to realize the nature of the trusteeship of Mike Ames was as sole trustee for the profit-sharing plan.

The profit-sharing plan and its trust monies were flagrantly violated. For

example, on February 3, 1983, \$50,000 was advanced to Threaded Steel which was wired to InterFirst Bank of Beaumont and the \$50,000 was wired directly to the account of Threaded Steel Products, a corporation, at the InterFirst Bank. Then on February 7, an additional \$54,000 was wired. Shortly thereafter there was an additional letter of credit drawn in favor a firm known as Alcan Metal Goods or Alcan Aluminum in the amount of forty-two thousand plus dollars. By July of '83 the Bank had fully converted the CD to pay the commercial loans and debts of Threaded Steel. The Bank unequivocally acknowledged through its chief commercial loan officer that the relevant CD was issued to Mike Ames as trustee. Sheffield was asked: "You are aware that some of the

funds from Southwestern Life check that initially was deposited over here were wired to InterFirst and funds were wired back from InterFirst?" Sheffield's answer was an unequivocal "yes".

Sheffield acknowledged that the corporate resolutions were for the benefit of the corporation. It is clear that the corporate resolutions on the forms supplied by the State Bank did not empower the corporation or the Bank to use profit sharing trust funds as collateral or to be used as an offset for defaulted commercial loans to Threaded Steel Products.

There are simply no provisions in the corporate resolutions (which were unequivocally affirmed by Mr. Sheffield during cross examination) that conferred any authority or power at all for Mike Ames to

use the profit sharing trust funds on behalf of the corporation to secure commercial loans. The Bank had notice of this. We find this: Questions by Mr. Almquist:

"Q. Mr. Sheffield, turning back to the Corporate Resolution, can you refer to us--show us any place in that Corporate Resolution where they discuss what authority Mr. R.M. Ames [Mike] has with respect to the pension or profit sharing benefits?

"A. There's none whatsoever.

"Q. None at all?

"A. Not in the Corporate Resolution.
That refers to Threaded Steel Products, a corporate entity.

"Q. With respect to the Corporate Resolution, where does it say that Mike

[475] Ames can set up an account in the names of R.M. Ames, Trustee, or conduct activities in the name of R.M. Ames, Trustee?

"A. I have no documentation to that effect, at least in this file.

....

"Q. In fact, there are two (2) points there that it says "R.M. Ames, Singly," doesn't it?

"A. No.

"Q. On the Corporate Resolution where they've typed in his name.

"A. R.M. Ames. R.M. Ames, what, Sr.?

"Q. Singly.

"A. Oh, singly.

"Q. S-i-n-g-l-y.

"A. Yes, I'm sorry.

"Q That's the way it's typed in on two (2) placed there; is that right?

"A. Yeah."

The banker stated that it was common to have proper documentation when dealing with trusts or with trustees. We also find this:

"Q. Let me look at one (1) other items over here. When Mr. Winchester was drawing this up here a little while ago, he wrote down a figure of one fifty-seven (157). Actually, what we're talking about in money that come in was one five seven eight nine five '0' two (15789502); is that right?

"A. Let me go back and refer to that. That's correct.

"O. Okay. And, to that, the bank put ninety-six thousand one 'o' four ninety-eight (96,104.98); is that right?

"A. Uh-huh (yes), yeah.

"Q. So, when you got to this R.M. Ames, Trustee CD, the amount of the CD is two hundred and fifty-four thousand dollars (\$254,000.00); is that right?

"A. That's correct.

"Q. And Mr. Sheffield, that is the same figure that went out of Heights State Bank on November 18th, 1982, isn't it, sir?"

"A. Yes."

Thus because of the chronology of events, because of the similarity of the figures, because of the fact that Mike Ames acted as Trustee, because of the fact that the only trustee capacity when Mike

Ames told the bank was his capacity as trustee for the pension and profit sharing plan, because of the shortness of the duration of the times involved in the chronology, we hold that the verdict of the jury is against the great weight and preponderance of the evidence.

A landmark, definitive case on the issue of the Bank's duty to the beneficiary of a trust in connection with the misbehavior of the fiduciary trustee is United States Fidelity & Guaranty Company v. Adoue & Lobit, 104 Tex. 379, 137 S.W. 648, aff'd on reh., 104 Tex. 379, 138 S.W. 383 (1911). The Court wrote as follows, in relevant part:

"But if the bank has notice or knowledge that a breach of trust is being committed by an improper

withdrawal of funds, or if it participates in the profits or fruits of the fraud, then it will be undoubtedly liable."

137 S.W. at 653.

The United States Court of Appeals for the Fifth Circuit applied Texas law in a diversity of citizenship case, in South Central Livestock Dealers v. Security State Bank, 551 F.2d 1346 (5th Cir.1977), modified on other grounds and aff'm on reh. 614 F.2d 1056 (5th Cir.1980). The Fifth Circuit wrote upon litigation involving out-of-state cattle investors who brought an action against a Texas bank on a claim of wrongful offset and tortious interference with contractual relations. The Fifth Circuit Court, in relevant part, wrote:

"Texas has long held that if a bank knows that deposits by a debtor in his own name are in fact held by him in a fiduciary capacity, then the bank may not apply such funds to the individual indebtedness of the debtor."

551 F.2d at 1349. Indeed, in our case, the funds were constantly held in the name of the trustee. [476]

The Appeal of R.M. (Mike)

Ames, Trustee

[2-4] Mike Ames appeals from the judgment against him. This judgment is in favor of R.E. and R.G. Ames. Generally, a trustee, in our jurisdiction, shall exercise the judgment, care and prudence

that persons of ordinary prudence, discretion and intelligence would exercise in the management of their own affairs when the said trustee is supervising and managing trust property. See TEX.PROP.CODE ANN. Sec. 113.056(a) Vernon 1984. Hornbook law establishes that a fiduciary relation exists between a trustee and the beneficiaries of his trust and such fiduciary relationship must not be breached or violated. In Maykus v. First City Realty and Financial Corp., 518 S.W.2d 887, 892 (Tex.Civ.App.--Dallas 1974, no writ), the court wrote:

"The actions of such a party must be judged not by the morals of the market place, but by 'the punctilio of an honor the most sensitive.' ..."

The law of trusts is well settled that a trustee owes to his beneficiaries an unwavering duty of good faith, fair dealing, loyalty and fidelity over the affairs of the trust and its corpus. Certainly, a trustee is not permitted to comingle trust funds with either personal funds or corporation funds in order to obtain commercial loans from banks. See Pershing v. Henry, 236 S.W. 213, (Tex.Civ.App.--Amarillo 1921), aff'd 255 S.W. 382 (Tex.Comm'n App.1923, judgment adopted).

[5-8] The record is clear that the Appellee, Mike Ames, was a personal trustee of the funds of the profit-sharing plan. He was not a trustee of, or for, the corporation named Threaded Steel Products Company. A trustee may not lend

trust funds to himself or to an affiliate. TEX.PROP.CODE ANN. Sec. 113.052(a) (Vernon 1984). Nor may the trustee lend trust funds to the trustee's employer or to a director, officer or employee of the trustee. And, so long as a person acts as a trustee, that person has the obligations and duties of a fiduciary. Maykus, supra. See 4 A. Scott, Law of Trusts, Sec. 334, at 2644-48, (3rd Ed.1967). See Smith v. Bolin, 153 Tex. 486, 271 S.W.2d 93 (1954). A trustee is definitely required to conduct himself, in his trustee affairs, with scrupulous good faith and fidelity when dealing with the interests of his beneficiary. It is equally imperative upon a trustee, in his dealings with the trust property, not to use the trust property, corpus or income in his own

private business. The trustee must not make any incidental profits for himself, nor is he to acquire or obtain any pecuniary gain from his high, fiduciary position. This is true because the beneficiary is entitled to claim the advantages gained by the fiduciary relationship and to hold the trustee chargeable for losses occurring from the violation of the trustee's fiduciary duties. Pershing v. Henry, 236 S.W. 213 (Tex.Civ.App.--Amarillo 1921) aff'd 255 S.W.2d 382 (Tex.Comm'n App.1923, judgment adopted).

[9] Moreover, if a trustee converts the trust fund or the trust corpus into a different form of property, either taking into himself the title or placing the title in a corporation, the trustee has

breached and violated his trust. Hand v. Errington, 242 S.W. 722 (Tex.Comm'n App., Sec. A, 1922, judgment adopted).

The chancery courts have adopted a well-settled principle of equity that, when a relationship of trustee and cestui que trust once arises, it pervades every transaction respecting the trust. Hand v. Errington, supra.

Moreover, we perceive that the Appellants had and have the right to receive their share of the proceeds of the large check from Southwestern Life Insurance Company as long as the same were identifiable or traceable--as they were here--into the CD issued by the State Bank and have that CD in the name of Mike Ames, trustee, impressed with their rights as cestuis que trust.

It should be noted that, when the attorney for the Appellants asked Mike Ames whether or not he, as Trustee, obtained a fidelity bond or surety bond when he took over the plan, Mike declined to answer the question. It was announced by Mike's attorney that Mike Ames would invoke the [477] Fifth Amendment privilege against giving answers which might tend towards some sort of self-incrimination. The attorney for Mike Ames announced that he had so advised his client as to any questions pertaining to the operation of the plan or its administration during the period of time Mike Ames served as Trustee. Thereafter, the Trustee, Mike Ames refused to answer the questions on about 32 different occasions, with answers reading:

"A. I'm not going to answer the question." Or, "I will not answer that question", or answers that were very similar in wording.

After a lengthy line of questions by the Appellants' attorney, which were certainly relevant and material, seeking important information, the Trustee was finally asked:

"Q. With respect to the questions that I have asked today that you refused to answer--and I think your attorney has cleared this up earlier, but just for the record--you are invoking your Fifth Amendment right as the basis for refusing to answer these questions?

"A. Yes."

Mike was also asked:

"[Q]. Where are the funds of the Threaded Steel Products employees' profit sharing plan located at the present time?

"A. I won't answer the question.

....

"Q. Mr. Ames, you have consulted with your attorneys here. Have you decided to change your answers or to answer any of the questions that have been asked today?

"A. No."

The Effect and Requirements
of Pool v. Ford Motor Co.

In Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex.1986), the court wrote:

"Our continuing review of courts of appeals decisions in which factual insufficiency points are discussed convinces us that the overwhelming majority of those opinions represent honest efforts by their scriveners to adhere to the guidelines of In re King's Estate...."

"In order that this court may in the future determine if a correct standard of review of factual insufficiency points has been utilized, courts of appeals, when reversing on insufficiency grounds,

should, in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust...."

In this opinion, we have attempted to follow the Supreme Court, in Pool, supra; and, hence, this opinion has been lengthy. Indeed, we have tried to set out, in detail, and by actual quotes from the record, the contrary evidence that so greatly outweighs the evidence, if any probative evidence does exist, in support of the verdict below. The startling fact is that, right up [to] the very end, the State Bank off-set ordinary, delinquent commercial loans, made as business loans,

for the benefit of Threaded Steel. The Bank off-set those bad loans against funds standing in the name of a trustee and the exhibits clearly show this. The Bank knew the nature of the Trusteeship of Mike Ames, being the sole trustee of the profit-sharing plan and the nature of the funds as being profit-sharing funds belonging to the beneficiaries. Mike never told the bank differently. We decide, regardless of whether the bank could somehow attempt to claim it did not know exactly who the beneficiaries were, that that was no excuse to off-set an ordinary commercial loan made to Threaded Steel against trust fund monies held in the name of the trustee. From past dealings, the Bank had to know that there was no trustee for Threaded Steel and that

Mike Ames was the sole trustee for the beneficiaries of the profit sharing plan and the pension plan.

One very startling fact is that the certificate of deposit with the State Bank, dated February 28, 1983, in the amount of \$159,914.06 (Plaintiff's Exhibit No. 7), certified that the money was on account with the bank for the Threaded Steel Products Co., [478] Employees Profit Sharing Disbursement Account and that certificate of deposit had a maturity date of March 30, 1983, and the certificate of deposit affirmatively showed R.M. Ames, as Trustee for the Employees Profit Sharing Disbursement Account. This \$159,914.06 was disbursed to the employees of Threaded Steel.

When the banker was testifying about the \$157,000, the very language of the questions and the very wording of his answers makes it clear that he was talking about the same \$157,000 that was transferred to InterFirst Bank of Beaumont and then retransferred to the State Bank.

In passing upon the issue of whether the verdict was against the great weight and preponderance of the evidence, under this record, it is necessary for us to examine, the actual wording used in the questions to and answers of the banker and the other witnesses. It is glaringly clear that the initial \$157,895.02 fund was definitely a portion of the profit sharing and pension plan. Under this record, it can be definitely deduced that the \$157,895.02 was part of the amount

that was taken out of the profit sharing plan in the Heights State Bank in Houston, and wired to the InterFirst Bank of Beaumont, and, within a short time, this amount of money was by wire retransferred to the Heights State Bank. This money was put in a certificate of deposit in the name of R.M. "Mike" Ames, Trustee. The Heights State Bank had to know that, at least \$157,895.02, was sacred trust funds. It must be borne in mind that the banker admitted that, out of the \$424,888.35, a sum of \$156,500 was used to purchase an original certificate of deposit in the name of the Employees Profit Sharing Distribution Account. Certainly the language and wording of the questions and answers, indicate that the banker agreed and knew that the \$157,895.02 was money

that was transferred back and had its origin in the \$254,000 certificate of deposit which was marked and definitely identified as part of the Profit Sharing Plan. Indeed, Heights State Bank makes this unequivocal statement, in its brief:

"The Appellants somehow want the Court to infer that the funds in C.D. 28793 belong to the Appellants because there had been an earlier certificate of deposit in the same amount, which apparently did belong to a profit-sharing plan...."

We think such an "inference" is altogether syllogistic. It is, indeed, inescapable. We decide these facts are more than an inference.

The Jurisdictional Issue

[10] We further hold that the federal statute which specifically governs the pension and profit-sharing plans, being 29 U.S.C. Secs. 1132, et seq., (1985 & Supp. 1988), especially provides that a participant in the plan has the election to bring his action in the state court to recover his benefits due to him under the terms of his plan. 29 U.S.C. Sec. 1132(a)(1)(B) (1985). 29 U.S.C. Sec. 1132(e) (1985) specifically provides:

"State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsections (a)(1)(B) of this section."

And Sec. 1132(a)(1)(B) provides that a civil action may be brought by a participant or beneficiary to recover benefits under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan. Hence, the federal law specifically mandates that state courts "shall have concurrent jurisdiction". This language is clear and unambiguous. We sanguinely overrule the contention and point of error of Mike Ames that the state court did not have competent jurisdiction to try this litigation.

The sole basis of the appeal in the brief of R.M. "Mike" Ames, the Trustee, is based on the contention that the state district court did not have jurisdiction either before trial, after the receipt of

evidence, or after the verdict was returned. Under the pleadings of R.E. Ames and R.G. Ames, and under the record, these participants and beneficiaries of the plan were certainly trying to recover benefits due to them under the terms of the plan as well as to enforce [479] their rights under the terms of the plan. 29 U.S.C. Sec. 1132(a)(1)(B) (1985).

[11] Generally, the ERISA preempts any state law which attempts to directly regulate or moderate the contents or operations of the plan. However, if a cause of action is brought in state court to enforce the terms and to enforce and recover the benefits of a retirement plan or a profit-sharing plan, such an action shall not be deemed to be preempted by

ERISA. Lukus v. Westinghouse Elec. Corp.,
276 Pa. Super. 282, 419 A.2d 431 (1980).

The trustee, Mike Ames concedes in his brief that Section 1132(a)(1)(B) encompasses actions for the violation of terms of a profit-sharing benefit plan, citing Sams v. N.L. Industries, Inc., 735 S.W.2d 486 (Tex. App.--Houston [1st Dist.] 1987, no writ). Here the Appellants R.E. and R.G. Ames are asserting their rights under the plan. See Odgen v. Michigan Bell Tel. Co., 595 F.Supp. 961, 966 (E.D.Mich.1984). Trustee Mike Ames also concedes that actions under Subsection (a)(1)(B) recognizes suits to recover benefits under a plan.

[12] It should be borne in mind that, in Plaintiffs' Second Amended Petition, the live, trial pleading, R.E.

Ames and R.G. Ames pleaded that the plan had been terminated and that the Plaintiffs, in their Second Amended Petition, pleaded for their monies which had been converted and that R.M. "Mike" Ames, as well as the Heights State Bank, were guilty of the tort of conversion and, in so doing, Mike Ames had acted with malice or gross negligence. By pleading the tort of conversion, as done here, we perceive that that was an additional cause of action or trial allegation, giving the State trial court the jurisdiction.

We determine that the appeal taken by Mike Ames was for delay and without sufficient cause. We award R.E. Ames an additional five (5) percent of the amount of the jury verdict in his favor. We award R.G. Ames an additional five (5)

percent of the amount of the jury verdict in his favor. Furthermore, we award an additional five (5) percent of the punitive damages. The interest on these additional awards pursuant to TEX.R.APP.P. 84 will begin to run from the date of this Opinion and thereafter until paid.

Query: What disposition should a
Court of Appeals order under
this record?

We feel constrained, and, indeed, we are constrained, to follow the very recent case of Cropper v. Caterpillar Tractor Company, 754 S.W.2d 646 (Tex. 1988), delivered by Justice James P. Wallace.

Justice Wallace wrote:

"...[W]e decide whether a court of appeals has the authority to remand a cause for a new trial when it concludes that a jury's failure to find in favor of a party on a particular issue is 'against the great weight and preponderance of the evidence.' We hold that a court of appeals has the authority to review a 'failure to find' in the same manner in which it may review a jury's findings. TEX.CONST., art. V, Sec. 6. We further hold that this review does not violate the right of trial by jury. TEX.CONST., art. 1, sec. 15.

....

"The jury answered all issues favorably to Cropper, including the

following defensive issue submitted at Caterpillar's request:

"Was ANTHONY CROPPER Negligent in the operation of the Water Wagon on the occasion in question?

"ANSWER: No."

Quoting further, at page 648:

"The Texas Constitution confers upon the court of appeals 'appellate jurisdiction...under such restrictions and regulations as may be prescribed by law,' and further provides that 'the decision of said courts shall be conclusive upon all questions of fact brought before them by appeal or error.' TEX. CONST. art. V, sec. 6. These two clauses have independent significance, and

have quite different consequences upon the allocation of jurisdiction between this court and the intermediate appellate courts.... The latter, which will be referred to as the [480] 'factual conclusivity clause,' functions not as a grant of authority to the courts of appeals but as a limitation upon the judicial authority of this court. Choate v. San Antonio & A.P. Ry. Co., 91 Tex. 406, 44 S.W. 69 (Tex.1898)."

Quoting further, at page 648:

"II.

"The authority of the courts of appeal to review a 'non-finding.'

"In Pool v. Ford Motor Co., 715 S.W. 2d 629 (Tex. 1986), the court recently intimated in dicta that

there might be some distinction between view of findings and non-findings. While recognizing that the constitution empowers courts to 'unfind' a jury's findings, the court observed that it was 'more difficult to rationalize' why a non-finding should be reviewable under a great weight and preponderance standard. 715 S.W.2d at 634. This difference between findings and non-findings had previously been described as a 'distinction which exists in semantics and theory only but which does not exist in reality.' Dyson v. Olin Corp., 692 S.W.2d 456, 458 (Tex. 1985) (Robertson, J., concurring). If there is any inference in Pool that there is a distinction between

review of findings and review of non-findings, we lay that question to rest."

Hence, we follow Cropper, supra; Herbert v. Herbert, 754 S.W.2d 141 (Tex. 1988), being No. C-4986, opinion by Justice Kilgarlin, and Pool v. Ford Motor Co., supra.

[13] Thus, we reverse the judgment in favor of the bank against R.E. and R.G. Ames and remand that cause of action for a new trial on the whole merits of the case. We order that this reversal of that part of the judgment below, and this remand, is severed from the remainder of this appeal. We concede that the recitation of the facts and the narratives from the record in this opinion have been somewhat lengthy. We maintain that this was

necessary because of the directives contained in Pool v. Ford Motor Co., supra. The Supreme Court's opinion speaks of a jury's findings, but Cropper, supra, makes it clear that the same standard of review should be applied to a non-finding.

Further, the Supreme Court wrote that the Courts of Appeal, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. We have followed this directive. See Calvert, "'No Evidence' and 'Insufficient Evidence' Points of Error", 38 TEX.L.REV. 361 (1960).

We find virtually no evidence of significant probative value that supports the verdict as to the Bank. It is correct that the loan officer did, on the stand,

testify somewhat differently from the testimony that he gave in his deposition.

Having severed part of this appeal as to the State Bank, we affirm the judgment in favor of R.E. Ames and R.G. Ames against R.M. "Mike" Ames, adding the five (5) percent as set out above pursuant to TEX.R.APP.P. 84.

AFFIRMED IN PART AND REFORMED, with the Affirmance being severed from the balance of the Appeal; REVERSED IN PART AND REMANDED, with the Reversed part remanded for a new trial.

BURGESS, Justice, concurring and dissenting.

I concur in the substantive result of the case, but respectfully dissent to the

imposition of a five percent penalty under
TEX.R.APP.P. 84.

The majority finds that the appeal was brought "for delay and without sufficient cause." I do not believe the jurisdictional question had been fully resolved by our Texas courts, and in fact, the trial judge must also have been of that opinion when he stated:

THE COURT: Counsel, I don't intent to cut you short. I'm going to overrule the Defendant, Mike Ames' Motion for Instructed Verdict. With regard to this Motion to Dismiss in a written Motion, I have not gone and read these cases, this multitude of cases that you've cited in this thing. But, just for the record, and this is worth zero, I think it's

absolutely [481] ridiculous that this question appears to be so unclear, even to federal courts, as to what state courts can and cannot do. And, the matter to me, and this may be a serious oversimplification of the problem, is that they probably need to state that state courts cannot hear any matter regarding Employee Retirement Income Security Act cases, period. But, I don't know whether I have jurisdiction or not. I just want to state that for posterity. I don't think I'll ever know. I'm going to overrule the Motion to Dismiss it, and we'll see what they have to say about this case. We'll give them another one to write on.

Appellant should not now be penalized when the trial court invited, in a manner of speaking, appellate review. Therefore, I respectfully dissent to the imposition of the penalty.

(The emphasized portions of this opinion are as reported at 757 S.W.2d 468. The emphasis is by the Court.)

APPENDIX B

NO. 09-87-125 CV

ROGER MICHAEL AMES,	*	APPEALED FROM THE
ET AL	*	58TH JUDICIAL
APPELLANT	*	
	*	
VS.	*	DISTRICT COURT OF
	*	
R.E. AMES AND	*	
R.G. AMES, ET AL,	*	JEFFERSON COUNTY,
APPELLEES	*	T E X A S

J U D G M E N T

The entire case and cause of action whose style and number are set out above came to us by timely appeal and this Ninth Court of Appeals, the State of Texas, having jurisdiction and venue of all the parties hereto and the subject matters hereof and all the matters having been set out in the pleadings of the various parties, decide, conclude, determine, order and adjudge as follows:

The appeal of R.E. Ames and R.G. Ames complaining of a take-nothing judgment in favor of the Heights State Bank is hereby SEVERED, and that part of the judgment adverse to R.E. Ames and R.G. Ames and in favor of the Heights State Bank is hereby REVERSED and that severed cause is hereby REMANDED for a new trial on the whole merits.

It is further ORDERED AND ADJUDGED by this Ninth Court of Appeals that the remainder of this appeal being the severed appeal of R.M. "Mike" Ames, appealing from a judgment against him and in favor of R.E. Ames and R.G. Ames, is hereby AFFIRMED, provided, however, that pursuant to TEX. R. APP. P. 84, the amount awarded to R.E. Ames by the jury, being \$212,161.40, is hereby increased by five

(5) percent, making a total of \$222,769.40; and the amount awarded to R.G. Ames by the jury, being \$94,501.00, is hereby increased by five (5) percent, making a total of \$99,226.00.

It is further ORDERED AND ADJUDGED that the punitive damage award in the amount of \$10,000.00 which was awarded jointly to R.E. Ames and R.G. Ames shall also be increased by five (5) percent (\$500.00) resulting in a total of \$10,500.00.

The costs of this appeal incurred by the appeal of R.M. "Mike" Ames are hereby taxed against R.M. "Mike" Ames; the costs of this appeal incurred by the appeal of R.E. Ames and R.G. Ames against Heights State Bank are hereby taxed against Heights State Bank.

SIGNED, RENDERED, AND HANDED DOWN,
August 25, 1988.

/S/ Jack Brookshire
JACK BROOKSHIRE
Justice

/S/ Martin Dies, Jr.
MARTIN DIES, JR.
Chief Justice

Burgess, J., dissents.
A copy of his dissent is attached to the
opinion.

APPENDIX C

NO. B-117,444

R. E. AMES AND	*	IN THE DISTRICT
R. G. AMES	*	COURT OF
	*	
VS.	*	JEFFERSON COUNTY,
	*	T E X A S
ROGER MICHAEL AMES,	*	
TRUSTEE OF THE	*	
THREADED STEEL	*	
PRODUCTS COMPANY	*	
EMPLOYEES' PROFIT	*	60TH JUDICIAL
SHARING PLAN, ET AL	*	DISTRICT

J U D G M E N T

On the 18th day of March, 1986, came on to be heard the above-captioned and numbered cause and the parties having appeared in person and by attorneys of record announced ready for trial, and a jury having been previously demanded, a jury consisting of 12 good and lawful jurors was duly impaneled and the case proceeded to trial. At the conclusion of

the evidence, the Court submitted the case to the jury on special issues. The charge of the Court, including the special issues, and the verdict of the jury, are incorporated herein for all purposes by reference. It appearing to the Court that the verdict of the jury was for the Plaintiffs and against the Defendant Roger Michael Ames and for the Defendant Heights State Bank against Plaintiffs, judgment should be rendered upon the verdict in favor of the Plaintiffs and against the Defendant Roger Michael Ames;

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that R. E. Ames have and and [sic] recover from Defendant Roger Michael Ames the sum of TWO HUNDRED TWELVE THOUSAND ONE HUNDRED SIXTY-ONE AND 40/100 DOLLARS (\$212,161.40). IT IS

FURTHER ORDERED that R. G. Ames have and recover from Defendant Roger Michael Ames the sum of NINETY-FOUR THOUSAND FIVE HUNDRED ONE AND NO/100 DOLLARS (\$94,501.00) and that R. E. Ames and R. G. Ames do jointly recover from Roger Michael Ames the sum of TEN THOUSAND AND NO/100 DOLLARS (\$10,000.00) in punitive damages.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiffs R. E. Ames and R. G. Ames do have and recover NOTHING of and from the Defendant Heights State Bank.

IT IS FURTHER ORDERED that the Judgment hereby rendered shall bear interest at the legal rate from the date of judgment until paid. All costs of court expended or incurred in this case are hereby adjudged against Roger Michael Ames. All writs and processes for the

enforcement and collection of this judgment and the costs of court may issue as necessary. All other relief not expressly granted herein is denied.

SIGNED and ENTERED this 29th day of April, 1987.

RONALD L. WALKER
JUDGE PRESIDING

